In the Supreme Court of the United States

OCTOBER TERM, 1971.

No. 71-867.

TOM SIMICH, *et al.*,
Petitioners,
vs.
DOBROSAV MILISAVLJEVIC, *et al.*,
Respondents.

TOM SIMICH, *et al.*,
Petitioners,
vs.
ST. SAVA SERBIAN EASTERN ORTHODOX CHURCH OF CLEVELAND, OHIO,
Respondent.

TOM SIMICH, *et al.*,
Petitioners,
vs.
ST. SAVA SERBIAN EASTERN ORTHODOX CHURCH OF CLEVELAND, OHIO, *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO.

BRIEF FOR RESPONDENTS IN OPPOSITION.

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BRIEF FOR RESPONDENTS IN OPPOSITION.

OPINIONS BELOW.

In addition to the opinions below contained in the Petitioner's Appendices, Respondents have reproduced the unreported opinions and judgment entries of the Ohio Eighth District Court of Appeals in the original cases of *Savko Jovanovic v. Tom Simich, et al.*, and *St. Sava Serbian Orthodox Church of Cleveland, Ohio v. Milan Naperta, et al.* (Appendix pp. 28 to 51, *infra*).

QUESTION PRESENTED.

The Respondents disagree with the statement of "Questions Presented" set forth on pages 3-4 of Petitioners' Brief.

The only Question presented on Petitioners' appeal is:

Where the members of an Ohio incorporated church have a substantial controversy over the identity of the governing body or bodies which exercise general authority within the church, can civil courts, in resolving property disputes inquire into the religious law and usage essential to the resolution of the controversy?

COUNTER STATEMENT OF FACTS.

Respondents cannot accept the Statement of the Case as presented by Petitioners because a correct Statement of the Case materially affects the answer to the question presented by Petitioners.

Respondent Church Corporation is a non-profit Ohio Corporation, an independent and congregational type church, and owns the property which is the subject of this litigation. Its unqualified ownership has at all times been admitted by all parties.

About 1907, at a time when the so-called Mother Church and its hierarchy was not in existence, Americans of Serbian descent established a church in Cleveland, Ohio, where they could worship and follow the Christian religion and associated themselves with the Christian American Russian Eastern Orthodox Diocese. They established the church themselves with their own assiduous labor and without any help, financial or otherwise, from any hierarchy in Europe. The governments of most of the churches set up by the Serbs, in this country, were

democratic in principle and provided for local church affairs to be run by the majority vote of the members of the Church, meeting in general assembly, including the election of officers and the selection of a priest. This is well illustrated by Article II, paragraph 1, Section (B) of the *unanimously adopted* by-laws of the corporation (see Appendix p. 52, *infra*) which states that one of the purposes for which the organization is formed is to spread and foster love and respect for the Serbian Orthodox people, the people of the United States of America, the Constitution of the United States, and the democratic-American way of life.

The so-called Mother Church and its hierarchy only came into existence after the First World War, when what is now Yugoslavia was formed by the consolidation of three Balkan countries, Serbia, Croatia and Slovenia.

In 1927 the American Eastern Orthodox Churches of principally Serbian membership elected and sent to a National Conference delegates to form and write a Constitution for an independent Serbian Eastern Orthodox Diocese. Thereafter, the diocese became associated with the Serbian Eastern Orthodox Church in Belgrade, Yugoslavia as a separate and independent diocese.

Also, in 1927, the St. Sava Church of Cleveland withdrew from the Christian American Russian Eastern Orthodox Christian Diocese and voluntarily associated with the new Serbian Eastern Orthodox Diocese, which is now incorporated in Illinois and known as the Serbian Eastern Orthodox Diocese for the United States of America and Canada.

The unanimously adopted By-laws of the Cleveland Church Corporation specifically provide that it is associated with that incorporated diocese in Illinois and with no other organization.

The St. Sava Church of Cleveland has made no change in its association with the Illinois incorporated diocese and remains associated therewith as provided by its by-laws.

The Petitioners herein are a small minority who at the start of litigation herein were members of the Church Corporation, but have since refused to abide by the unanimously adopted corporate by-laws, have refused to support the St. Sava Church Corporation by the payment of the required dues, have abandoned the St. Sava Cleveland Church Corporation, and have joined with others who would now destroy the St. Sava Serbian Eastern Orthodox Church of Cleveland, Ohio and the Serbian Eastern Orthodox Diocese for the United States of America and Canada with which it has been associated for more than forty years.

Thus, the facts are clear that the individuals who are the Respondents herein are those who are loyal to the long established local incorporated Cleveland Serbian Eastern Orthodox Church and the Serbian Eastern Orthodox Diocese with which it has long been associated, while the Petitioners are the schismatics and constitute the breakaway faction.

It is a fact that there has been between persons who were members of the Church Corporation a very substantial controversy as to who are the true followers of the faith and further as to church policy, the resolution of which would require an inquiry into religious law and usage.

Original litigation involving the St. Sava Church Corporation of Cleveland, Ohio was the case of *Savko Jovanovic v. Tom Simich, et al.*, filed in October of 1963, being Cuyahoga County Common Pleas Case No. 790246.

The Second action filed was the case of *St. Sava Serbian Orthodox Church of Cleveland, Ohio v. Milan Naperta, et al.*, filed in March of 1964, and being Guyahoga County Common Pleas Court Case No. 795014.

Both these cases originally sought injunctive relief raising questions of corporate membership and control.

For the purposes of brevity we shall here refer to the two above captioned cases as the *Jovanovic* case and the *Naperta* case.

The *Jovanovic* case was first appealed on questions of law. The *Naperta* case was appealed on questions of law and fact.

On the 22nd day of March, 1966 the Court of Appeals, Tenth Judicial District, sitting for and in behalf of the Court of Appeals, Eighth Judicial District, wrote an opinion (unreported) in the *Jovanovic* case, and on the 7th day of April, 1966 it rendered its written decision (unreported) in the *Naperta* case. That opinion and the decision are, together with related journal entries, reproduced in full in the Appendix hereof for the convenience of this Honorable Supreme Court (Appendix pp. 28 to 51, *infra*).

In disposing of the *Jovanovic* and the *Naperta* cases the Ohio Court of Appeals after commenting as follows:

> "It is important at the outset to strongly state to both factions that the ecclesiastical controversy cannot be resolved in a court of civil law. This court is not in any respect passing upon the religious, ecclesiastical authority of any patriarch, bishop or other clerical or nonclerical person.
>
> On the other hand, St. Sava Serbian Orthodox Church of Cleveland, Ohio, is also a corporation organized under the laws of Ohio. The manner and procedure by which it carries on its corporate ac-

> tivities is controlled by the statutes of Ohio, the corporation's articles of incorporation and its regulations. *St. Sava has adopted a set of bylaws. This court can and will apply the civil law pertaining to corporations as established in Chapter 1702, Revised Code, and the regulations adopted by the corporation in its bylaws.*" Appendix p. 31, *infra*. (Emphasis added).

issued its mandate to the Cuyahoga County Common Pleas Court in Case No. 790,246 requiring that court to:

> (1) Grant a permanent injunction prohibiting the enforcement of the resolution of December 2, 1962, relating to the payment of funds in addition to regular dues, and the denial to petitioners and others similarly situated of their right to vote because of their failure to comply with that resolution,
>
> (2) Require the holding of an election of officers in accordance with the bylaws of the Church Corporation and the law of Ohio, such election to be held at such time as the Court of Common Pleas may determine to be appropriate.
>
> (3) Oversee, by a Master Commissioner or otherwise, (a) the preparation of a membership book as provided by Section 1702.13 Revised Code, (b) the determination of individual claims to be a member or for reinstatement as a member of the Church Corporation, and (c) the call of a membership meeting and the conduct of the election.
>
> (4) Hold such further proceedings as may be in accordance with law. Appendix, p. 40, *infra*.

In obedience to that mandate the Court of Common Pleas of Cuyahoga County determined the individual claims of persons to be a member or be reinstated as a

member of the Church Corporation, prepared a membership book as provided by Section 1702.13 Ohio Revised Code and called a membership meeting *in accordance with the bylaws of the corporation* to be held on March 26, 1967 for the purpose of electing, under the supervision of the court, the officers of the Church Corporation.

It was within a few days after the call for such meeting was issued by the Common Pleas Court that Petitioners, in an attempt to stop the election, filed a declaratory judgment action, originally styled "*The St. Sava Serbian Eastern Orthodox Church of Cleveland, Ohio (an Ohio non-profit corporation), and Tom Simich v. Dobrosav Milisavljevic, et al.*, Cuyahoga County Common Pleas Court Case No. 841,384 (Court of Appeals No. 30057). This was the first of the consolidated cases now before this Honorable Court. After filing that petition a motion was filed in Common Pleas Court by Petitioners requesting the court to delay the scheduled election therein on March 26th. This motion was denied, the election was held as scheduled, and on March 30, 1967 the Common Pleas Court issued its judgment and decree of election of officers.

The Respondent Church Corporation instituted an action on April 4, 1967 styled "*St. Sava Serbian Eastern Orthodox Church of Cleveland, Ohio v. Tom Simich, et al.*: Case No. 842626" in the Court of Common Pleas of Cuyahoga County, Ohio (Court of Appeals No. 30049), petitioning the Court for a permanent injunction to enjoin Petitioners from interfering with the duly elected corporate officers in the performance of their duties in the administration of the corporate assets. This is the second of the consolidated cases now before this Honorable Court. In addition to their answer the Petitioners filed a counterclaim alleging that the officers were schismatics, heretics

and had departed from the faith, and claiming the duly elected officers were not in fact members of the church although they were certified to be so only a few days before by the court. This was substantially the same allegation made in Petitioners' prior declaratory judgment action.

Petitioners also appealed the results of the election proceedings certified by the Common Pleas Court and set forth in the assignments of error that the court in determining membership in the corporation had failed to determine whether or not certain persons were heretics, schismatics or had departed from the faith.

On December 21, 1967 the Honorable Court of Appeals of Ohio, Eighth Judicial District, after full consideration affirmed the election decree of March 30, 1967 and issued its special mandate ordering the judgment and decree of the lower court to be carried into execution. *No appeal therefrom was ever taken and that judgment and decree is final.*

Since March 30, 1967 (the date of the decree of the election), to date none of the Petitioners have paid any dues to the duly elected officers of the corporation as provided by the bylaws thereof and on the 4th day of August, 1968 Petitioners, after due notice for non-payment of dues and in strict accordance with the bylaws of the corporation provided therefor, had their membership terminated in the Church Corporation by vote of the general assembly called in meeting for the special purpose of the consideration thereof.

Thus, arises the third case (Court of Appeals No. 30059), under consideration herein styled, *Tom Simich, et al. vs. The St. Sava Serbian Orthodox Church of Cleveland, Ohio, et al., being Case No. 864,453 in the Cuyahoga County Common Pleas Court.* The petition in that case

was filed August 7, 1968 and purports to be a petition "for permanent injunction, temporary injunction and other equitable relief." That petition again in substance alleges that the duly elected officers of the church corporation are schismatics and have departed from the faith and asks that the court restrain such officers and the corporation from enforcing the expulsion of Petitioners as members of the church corporation and from using the corporate property for any purpose contrary to the decrees of the Serbian hierarchy in Belgrade, Yugoslavia.

The three cases now before this Honorable Supreme Court were consolidated by the Common Pleas Court for hearing on a motion for summary judgment filed by Petitioners. The Common Pleas Court granted Petitioners' motion for summary judgment and granted additional injunctive relief. Respondents appealed the granting of the motion for summary judgment. The Ohio Eighth District Court of Appeals reversed the Common Pleas Court and remanded the case for further proceedings according to law. Petitioners then appealed the decision of the Eighth District Court of Appeals to the Ohio Supreme Court. The Ohio Supreme Court dismissed the appeal as a matter of right and refused to certify the case for decision. Petitioners then filed the instant application for a writ of certiorari.

It is not a fact that the determination of facts found by the Common Pleas Court in the original case of *St. Sava et al. vs. Naperta, et al.*, "are unreversed." Petitioners' Brief, p. 10. That case was appealed on law and fact and heard de novo by the Ohio Court of Appeals which wrote an opinion (Appendix, p. 41, *infra*), and rendered judgment (Appendix, p. 46, *infra*). In so doing the Court of Appeals rejected and refused to consider evidence of ecclesiastical disputes in the determination of property

rights and the right to hold corporate office. That court stated on April 7, 1966:

> "At the outset, we again remind all parties that a man's beliefs, and his acceptance or rejection of ecclesiastical authority cannot be decided for him. By coming into a civil court only the control of buildings and material things can be effected. Such control can be used as a weapon to deepen the wounds of controversy, but of itself cannot help solve religious differences. Everyone should clearly understand that no court of civil law can restore unity to the congregation of St. Sava Church." (Appendix, p. 42, *infra*).

Counsel therefore takes serious exception with the alleged Statement of Facts submitted by Petitioners which seems to be mostly if not entirely based upon the alleged findings of the Common Pleas Court of Cuyahoga County in the *Naperta* case. Not only did the Court of Appeals in hearing the *Naperta* case de novo make its own findings of fact as found and set forth in its journal entry of October 10, 1966 (Appendix, p. 46, *infra*), but it also in its prior decision dated April 7, 1966 pointedly eliminated and struck down any reference to findings of fact or orders previously issued by the Common Pleas Court relating to a person's faith or church polity. See Appendix, p. 42, *infra*.

This refusal of the Ohio Court of Appeals in the *Naperta* case to consider ecclesiastical questions and matters of church polity was the subject of an appeal by Petitioners herein to the Ohio Supreme Court in 1966. The Motion to Certify was denied by the Ohio Supreme Court in Case No: 40577.

The trial court in the within causes later, however, appeared to accept the decision of the trial court in the *Naperta* case and refused to follow the rulings of the Ohio Court of Appeals and the Ohio Supreme Court. It erro-

neously granted the Petitioners' motions for summary judgment on the basis of the alleged findings of fact of the *Naperta* decision which the Court of Appeals said should be eliminated, were improper, and not to be considered.

ARGUMENT.

I. LACK OF JURISDICTION.

A. No "Final Judgment or Decree."

The jurisdiction of this Court to review decisions of a state court is based upon 28 U.S.C. 1257. That section permits only review of "*final* Judgments or decrees rendered by the highest court of a state." (Emphasis supplied). The judgment of the Ohio Supreme Court, for which review is sought by the Petitioners in this case is not a "final judgment or decree" within the contemplation of Section 1257.

Although this Honorable Court has stated that "(n)o self-enforcing formula defining when a judgment is 'final' can be devised", *Republic Natural Gas Co. v. Oklahoma*, 334 U.S. 62, 67 (1945), it, nevertheless, has provided ample guidance for determining the finality of a judgment for jurisdictional purposes. The rationale of the decisions rendered by this Court in regard to finality indicate that it is inappropriate to submit a federal question to the highest court in the land until a controversy is finally disposed of, thereby avoiding the possibility of piecemeal review and unnecessary abstract determination. See Boskey, *Finality of State Court Judgments Under the Federal Judicial Code*, 43 COLUMBIA LAW REVIEW 1002 (1943).

This Court has stated that a judgment or decree to be final "must terminate the litigation between the parties on the merits of the case, so that if there should be an affirmance here, the Court below would have nothing to

do but to execute the judgment or decree it had already rendered." *Bostwick v. Brinkerhoff*, 106 U.S. 3-4 (1882); see also *Gospel Army v. Los Angeles*, 331 U.S. 543, 546 (1947); *Market Street R. Co. v. Railroad Commission*, 324 U.S. 548, 551 (1945).

The judgment of the Supreme Court of Ohio in this case does *not* end the litigation between the parties. The Supreme Court of Ohio refused to review the decision of the 8th Appellate District Court of Appeals as a matter of right on the ground that there was no substantial constitutional question in existence. See Petitioners' Appendix A, p. 46. The Supreme Court of Ohio also refused to certify the case leaving the decision of the Court of Appeals unchanged. Petitioners' Appendix A, p. 46. The decision of the 8th Appellate District Court of Appeals had reversed and remanded the cause to the Common Pleas Court for further proceedings according to law. See Petitioners' Appendix A, p. 45. A judgment reversing a lower court and remanding the case for further proceedings has often been held not final by this Court. *Houston v. Moore*, 3 Wheat. 433 (U.S. 1818); *Rice v. Sanger*, 144 U.S. 197 (1892); *Hazeltine v. Central Bank*, 183 U.S. 130 (1901); *Union Mutual Life Ins. Co. v. Kirchoff*, 160 U.S. 374 (1896).

If this Court were to grant a writ of certiorari and review the judgment of the Ohio Supreme Court at this time, its decision could very well become merely advisory because Petitioners may ultimately triumph when the case is remanded to the Common Pleas Court for further proceedings. Such a premature consideration would surely be piecemeal review. This Court "ought not to pass on constitutional issues before they have reached a definitive stop." *Republic Natural Gas Co. v. Oklahoma*, 334 U.S. 62, 71 (1948).

B. Existence of Independent and Adequate Non-Federal Grounds.

This Honorable Supreme Court has also steadfastly followed the self-imposed jurisdictional rule that it will refrain from reviewing a state court judgment based on an independent and adequate non-federal ground. *Klinger v. Missouri*, 13 Wall. 257 (U.S. 1872); *Murdock v. City of Memphis*, 20 Wall. 590 (U.S. 1875). The rule extends to situations in which a state court decision is founded upon both a federal and state ground. This Court held in *Fox Film Corp. v. Muller*, 296 U.S. 207, 210 (1935):

> ". . . the case is controlled by the settled rule that where the judgment of a state court rests upon two grounds, one of which is federal and the other non-federal in character, our jurisdiction fails if the non-federal ground is independent of the federal ground and adequate to support the judgment."

The rationale behind the principle was aptly enunciated in *Herb v. Pitcairn*, 324 U.S. 117 (1945) at page 125:

> "This Court from the time of its foundation has adhered to the principle that it will not review judgments of state courts that rest on adequate state grounds. . . . The reason is so obvious that it has rarely been thought to warrant statement. It is found in the partitioning of power between the state and federal judicial systems and in the limitations of our own jurisdiction. *Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights. And our power is to correct wrong judgments, not to revise opinions. We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of federal laws our review could amount to nothing more than an advisory opinion.*" (Emphasis supplied).

The instant petition for writ of certiorari presents the classic case for imposition of the rule of jurisdictional self-restraint promulgated in the above cited cases. The judgment of the Supreme Court of Ohio rests on both a federal and an independent and adequate state ground. The original decision of the trial court from which the Respondent, herein appealed, was the granting of a motion for partial summary judgment in favor of the Petitioners. See Petitioners' Appendix A, pp. 24-25. The Eighth District Court of Appeals expressly reversed the trial court's granting of summary judgment on two distinct grounds and remanded the case for further proceedings. The judgment entry of the Court of Appeals clearly delineated the two grounds:

> "This cause came on to be heard upon the transcript, Bill of Exceptions, Assignments of Error and Briefs and arguments of counsel. This Court finds that the trial court committed prejudicial error in that *said judgment is in violation of the First and Fourteenth Amendments of the United States Constitution and contrary to the Ohio laws on summary judgment.*" (Petitioners' Appendix A, p. 45) (Emphasis supplied).

Petitioners appealed the decision of the Court of Appeals to the Supreme Court of Ohio. That Court dismissed Petitioners' appeal as of right finding no substantial constitutional question. Petitioners' Appendix A, p. 46. The Court also overruled Petitioners' motion to certify without opinion. Petitioners' Appendix A, p. 46. (Under current Ohio practice a notice of appeal filed in the Ohio Supreme Court constitutes a motion to certify and will be considered as such along with any claim of appeal as a matter of right, i.e. existence of substantial constitutional question. See Rules of Practice of the Supreme Court of Ohio, Rule II Sections 2 and 3.) The effect of the Ohio

Supreme Court's action was to withhold its jurisdiction and to leave the decision of the Court of Appeals undisturbed.

Therefore, the judgment which controls the litigation and rights of the parties at this point *is* the undisturbed judgment of the Eighth District Court of Appeals of Ohio. The federal ground upon which that judgment is based concerns a violation of the First and Fourteenth Amendments to the Constitution of the United States (see Petitioners' Appendix A, p. 40). The judgment, however, can also stand wholly upon the enunciated state ground i.e., the trial court's decision being contrary to the Ohio summary judgment laws.

The state ground exists independently of the federal ground and is, by itself, adequate to support the judgment. The finding that the trial court violated the Ohio law of summary judgment, in no way is dependent upon any federal statutes or case-law nor is it so "interwoven with the [federal ground] as not to be an independent matter. . . ." *Enterprise Irrigation Dist. v. Farmers Mutual Canal Co.*, 243 U.S. 157, 164 (1917). The Memorandum to Lawyers issued May 6, 1971 by the Eighth District Court of Appeals clearly reveals, the independent nature of the state grounds:

> "The trial court granted the motion for a partial summary judgment and found that St. Sava Serbian Eastern Orthodox Church headquartered in Belgrad, Yugoslavia, and the Eastern American and Canadian Diocese; that the Serbian Eastern Orthodox Church is hierarchical and episcopal in structure; that St. Sava is subordinate to the authority of the Serbian Eastern Orthodox Church in matters ecclesiastical in nature. The Court proceeded to grant a permanent injunction against any parties diverting or applying the property of St. Sava for any purpose other than

advancing the Serbian Eastern Orthodox faith as set out and promulgated by the Serbian Eastern Orthodox Church of Belgrade, Yugoslavia, and granted a permanent injunction against any parties carrying on action affecting the relationship of St. Sava to the Serbian Eastern Orthodox Church of Belgrade, Yugoslavia, unless said change in relationship is authorized by the ecclesiastical administrators of the Serbian Eastern Orthodox Church of Belgrade, Yugoslavia.

Pertinent parts of Revised Code Section 2311.041 (b) state:

> 'Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions of the genuineness of papers or documents, affidavits, transcripts of evidence in the pending case, and written stipulations of fact, if any, previously filed in the action show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. . . .'

In the three Court of Appeals cases before the trial court, Cases 30057, 30049 and 30059, Simich, et al., by petition or cross-petition claim St. Sava is a part of the Serbian Eastern Orthodox Church headquartered in Belgrade, Yugoslavia, and the Eastern American and Canadian Diocese and St. Sava is subordinate to the authority of Serbian Eastern Orthodox Church of Belgrade, Yugoslavia, and the Eastern American and Canadian Diocese in matters ecclesiastical.

However, the parties Milisavljevic and St. Sava Serbian Eastern Orthodox Church of Cleveland, Ohio, deny this relationship in their various pleadings. Affidavits E and A of the answer to the request for a summary judgment sworn to by Father Branko Kusonich and Milutin Ristich, president of the church corporation, say that St. Sava is not a member of the Serbian Eastern Orthodox Church of Belgrade, Yugoslavia, and the Eastern American and Canadian Diocese but

is instead a part of the Serbian Eastern Orthodox Diocese of the United States of America and Canada, an Illinois Corporate Diocese.

Therefore, the trial court committed prejudicial error in making the following two (2) findings of fact diametrically opposed to the pleadings and affidavit of the appellants:

> (1) That the defendant Church Corporation was a member of the 'Eastern American and Canadian Diocese,' one of the allegedly 'three new diocese . . .'
>
> (2) That the new defendant Church Corporation is subordinate to the authority of the Serbian Orthodox Church in Yugoslavia in matters ecclesiastical in nature.

Obviously the trial court could not find that 'there is no genuine issue as to any material fact.'

Accordingly, we reverse the judgment of the trial court, render final judgment for the appellants on the motion for partial summary judgment and remand the cause to the trial court for further proceedings according to law." Petitioners' Appendix A, p. 28-30.

The infringement of the Ohio summary judgment law by the trial court is sufficient to support the judgment rendered without consideration of the federal issue raised in the case. The legislative mandate of the Ohio summary judgment law, Revised Code 2311.041, when transgressed, demands reversal. *Stadelman v. Key GMC Truck Sales*, 22 Ohio App. 2d 161, 259 N.E.2d 520 (1970); *Leonard Insurance Agency v. Filles Motor Delivery*, 16 Ohio App. 2d 161, 242 N.E.2d 894 (1968).

If the judgment of the Court of Appeals and the judgment of the Ohio Supreme Court were to be found by this United States Supreme Court to be erroneous in regard to the federal Constitutional question, this Honorable Supreme Court would be unable to change the actual judg-

ments because they rest also on an independent and adequate state ground outside of the jurisdiction of the Court. To pass on the federal question under such a circumstance would be to render an "advisory opinion" in direct conflict with the jurisdictional philosophy established in *Herb v. Pitcairn*, 324 U.S. 117 (1945).

> "Any discussion of that question would not alter the legal relationship of the parties, since the judgment rendered by the state court would stand whether or not it correctly rules upon the federal question. All that would be accomplished by Supreme Court review would be an essay on the federal question, bearing the imprimatur of the Court but devoid of significance in the case at bar."
>
> *Henry v. Mississippi and the Adequate State Ground: Proposals for a Revised Doctrine*, 1965 Supreme Court Review 187, 201.

II. THE DECISION BELOW IS CLEARLY CORRECT.

The heart and core of this litigation is the right to the possession, use and control of the real and personal property of an Ohio church corporation.

This Honorable Supreme Court in *Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 440 (1969), and *Maryland and Virginia Eldership of the Churches of God et al. v. The Church of God at Sharpsburg*, 396 U.S. 367 (1970), plainly and clearly established the rule of law to govern such church property use disputes. The rule was first enunciated in the *Hull Memorial* case *supra* where this Court held:

> "Thus, the First Amendment severely circumscribes the role that civil courts may play in resolving church property disputes. It is obvious, however, that not every civil court decision as to property claimed

by a religious organization jeopardizes values protected by the First Amendment. Civil courts do not inhibit free exercise of religion merely by opening their doors to disputes involving church property and there are neutral principles of law, developed for use in all property disputes, which can be applied without 'establishing' churches to which property is awarded. But First Amendment values are plainly jeopardized when church property litigation is made to turn on the resolution by civil courts of controversies over religious doctrine and practice. If civil courts undertake to resolve such controversies in order to adjudicate the property dispute, the hazards are ever present of inhibiting the free development of religious doctrine and of implicating secular interests in matters of purely ecclesiastical concern. Because of these hazards, the First Amendment enjoins the employment of organs of government for essentially religious purposes. *Abington v. Schempp*, 374 U.S. 203 (1963); *the Amendment therefore commands civil courts to decide church property disputes without resolving underlying controversies over religious doctrine.* Hence, States, religious organizations and individuals must structure relationships involving church property so as not to require the civil courts to resolve ecclesiastical questions." 393 U.S. 440, 449 (1969). (Emphasis supplied).

The rule was reiterated and embellished by this Court a year later in the *Sharpsburg* case *supra*:

"To permit civil courts to probe deeply enough into the allocation of power within a church so as to decide where religious law places control over the use of church property would violate the First Amendment in much the same manner as a civil determination of religious doctrine. Similarly, where the identity of the governing body or bodies which exercise general authority within a church is a matter of substantial controversy, civil courts are not to make the

inquiry into religious law and usage which would be essential to the resolution of the controversy. In other words, the use of the Watson [*Watson v. Jones*, 13 Wall. 679 (U.S. 1872)] approach is consonant with the prohibitions of the First Amendment only if the appropriate church governing body can be determined without the resolution of doctrinal questions and without extensive inquiry into religious polity.

'(N)eutral principles of law, developed for use in all property disputes,' Hull supra, 393 U.S. 440, 89 S. Ct. at 606, provide another means for resolving litigation over religious property. Under the 'formal title' doctrine, civil courts can determine ownership by studying deeds, reverter clauses, and general state corporation laws." 396 U.S. 367, 369-370 (1970).

This unequivocal directive calling for civil abstention in religious matters was strictly heeded by the Ohio Supreme Court and Court of Appeals in the instant case. The Court of Appeals in the Supplemental Memorandum to Lawyers of June 30, 1971, adopted the exact language quoted above from the *Sharpsburg* case as the controlling rule of law applicable to the facts presented by the record to them for decision. Petitioners' Appendix A, p. 38. Following the quotation from this Honorable Supreme Court the Court of Appeals forcefully and unambiguously stated:

"There is no doubt that a controversy exists here between the parties as to which church is the appropriate church governing body and the answer *can not* be found without the resolution of doctrinal questions and without extensive inquiry into religious polity.

We are of the opinion that the answer to the question of which church the various parties are members of and which church's authority they are subject to would involve the determination of religious law and usage and require the determination of doctrinal questions and require extensive inquiry into religious polity, which inquiry is in violation of the First

Amendment to the United States Constitution." (Petitioners' Appendix A, p. 38) (Emphasis supplied).

Although the Court of Appeals was restrained from passing on the question of the proper governing church authority on the basis of the prohibition of this Honorable Supreme Court in the *Hull Memorial* and *Sharpsburg* cases, it was encouraged by those very same cases to decide the property use dispute, if possible, in accordance with neutral principles of law not involving religious considerations. 393 U.S. at 449, 396 U.S. at 370. The Court of Appeals found it possible to apply neutral principles:

> "Answers to these questions [questions of governing church authority] are not necessary to the determination of church property ownership and control since the property is in the name of an Ohio Corporation and neutral principles of law are applicable." (Petitioners' Appendix A, pp. 39-40).

The fact that the property was held in the name of an Ohio corporation known as St. Sava Serbian Eastern Orthodox Church of Cleveland, Ohio permitted the Court of Appeals to require that the trial court decide the property use dispute upon the neutral principles embodied in the Ohio corporate and property laws. Such judicial action is in strict accordance with the instructions of the *Hull Memorial* case *supra* which is quoted herein again for the sake of emphasis:

> "The Amendment therefore commands civil courts to decide church property disputes without resolving underlying controversies over religious doctrine. Hence, States, religious organizations and individuals *must* structure relationships involving church property so as not to require the civil courts to resolve ecclesiastical questions. 393 U.S. 440, 449 (1969) (Emphasis supplied).

By instructing the trial court that it was to decide this case on the basis of the neutral principles of law governing non-profit corporations, the Court of Appeals and the Supreme Court of Ohio insured the resolution of the church property dispute in the only manner available which did not require the consideration of religious doctrines. Such a decision correctly applies both the prohibitions and affirmative dictates of this Honorable Supreme Court in the *Hull Memorial* and *Sharpsburg* cases.

Petitioners argue that the decisions of the Ohio courts are based upon an erroneous interpretation of the *Hull Memorial* and *Sharpsburg* cases and that their constitutional rights were violated as a result of those decisions. Respondents, of course, take issue with the allegation of faulty interpretation, and, in addition, question the very existence of a constitutional right which can be claimed by Petitioners.

Petitioners state at p. 19 of their brief that

> "the Court of Appeals erroneously ruled that civil courts constitutionally cannot inquire into matters of church government. Both courts (Ohio Supreme Court and 8th District Court of Appeals) also erroneously assumed that 'neutral principles of law' are equated only with traditional corporate and property law concepts, thereby excluding the doctrine, enunciated in *Watson v. Jones,* as a neutral principle of law for resolution of the three cases at bar . . .
>
> Contrary to the Court of Appeals and the Supreme Court of Ohio, a review of the *Presbyterian Church* and *Church of God* cases clearly reveals that inquiry into church government and organization for the purpose of identifying the appropriate hierarchical denominational governing body has the express constitutional approval of this Supreme Court; provided that such an inquiry does not involve a determination of church doctrine and tenets."

Petitioners' characterization of the decision of the Court of Appeals is highly misleading and essentially incorrect. The Court of Appeals did not rule that civil courts constitutionally cannot ever inquire into matters of church government. That Court's ruling, more accurately stated, is that under the facts and circumstances presented to it in the record a civil court could not constitutionally inquire into matters of church government. The facts and circumstances contained in the record before the Court of Appeals evidenced a *substantial controversy* as to the church government of St. Sava Eastern Orthodox Church. Recognizing that important circumstance, the Court of Appeals necessarily and correctly followed the teaching of the *Sharpsburg* case in holding that civil courts could not inquire as to the church government of St. Sava. The *Sharpsburg* case emphatically directs that when there is a substantial controversy as to church government any inquiry concerning such church government by a civil court would necessarily require a determination of religious doctrine and tenets:

> "Similarly, where the identity of the governing body or bodies which exercise general authority within a church is a matter of substantial controversy, civil courts are not to make the inquiry into religious law and usage which would be essential to the resolution of the controversy.". 396 U.S. 367, 369-370 (1970).

Petitioners admit that "the touchstone of an unconstitutional 'extensive inquiry' is whether the same involves a determination of religious doctrine and tenet." Petitioners' brief p. 19. Such is the general rule of the *Hull Memorial* and *Sharpsburg* cases. But, this Honorable Supreme Court in the *Sharpsburg* case also instructed, as indicated above, that whenever there is substantial controversy as to church government any inquiry as to that

church government must include determinations of religious doctrine and tenet. Therefore, because the Court of Appeals was presented with a case involving a substantial controversy as to church government, it rightfully declined to make inquiry of that church government on the ground that it would require consideration of religious doctrine and tenet.

Having been prohibited by the *Sharpsburg* case from deciding the property use dispute on the basis of an inquiry into church government, the Court of Appeals, following the positive directive of the *Hull Memorial* case and the *Sharpsburg* case, instructed the trial court to decide the case upon the only "neutral principles of law" which could be utilized i.e. the non-profit corporation laws of the State of Ohio which are applicable because the church property was held in the name of on Ohio non-profit corporation. Petitioners contend that "neutral principles of law" include the *Watson v. Jones*, 13 Wall. 679 (U.S. 1872) doctrine which would permit consideration by the civil courts of the "interrelationships and legal effect of Articles of Incorporation, By-Laws, and Diocesan and Church Constitutions together with such other instruments as manifest church governmental organization." (Petitioners' brief p. 19). But, as indicated several times previously, the *Sharpsburg* case blocks *any* inquiry into church government in a case such as this where there is a substantial controversy as to the church government. 396 U.S. 367, 369-371, and especially see note 4, p. 370. For this reason the *Watson* case is clearly inapplicable.

Petitioners also predicate their request for certiorari on the ground that the action taken by the Court of Appeals and Supreme Court of Ohio has violated their constitutional rights. Petitioners seek to invoke the power

of a rather questionable constitutional right deemed to be in existence but not yet enunciated or fully defined by this Honorable Court (Petitioners' Brief p. 18). Petitioners characterize the newly discovered right at page 21 of their brief:

> "Petitioners assert that the First Amendment clauses, guaranteeing free exercise of religion and prevention of the establishment of religion, together with the Fourteenth Amendment all guarantee a Constitutional Right of church members to denominational continuity within the established framework of a particular hierarchical denominational church system." (Petitioners' Brief p. 21).

No authority is cited by Petitioners confirming the existence of such a right because no such right is in the contemplation of the First or Fourteenth Amendments of the Constitution. In fact, Petitioners claim as a right the very activity which the First Amendment attempts to prevent. In the context of a church property dispute which involves a substantial controversy as to the proper church governing body, to demand that the power of the state insure "denominational continuity" is to seek the establishment of a religion by the state. The Constitution seeks to preserve the right of men to make up their own minds in regards to religious beliefs and allegiances without state interference. *Everson v. Board of Education*, 330 U.S. 1, 11 (1947). How could the state through its courts insure "denominational continuity" without prying into the minds of its citizens to examine their religious beliefs? How could the state through its courts insure "denominational continuity" when there is a substantial controversy as to the proper governing body of a church? The mandatory response to these questions is that no right of "denominational continuity" can be guaranteed

without inquiry as to religious doctrine and tenet when there exists a controversy regarding governing church authority.

If there is a constitutional right to "denominational continuity" it only exists, as Petitioners themselves state, "within the established framework of a particular hierarchical denominational church" (Petitioners' Brief p. 21). The church property in this litigation is held by an Ohio non-profit corporation. This fact alone raises serious questions as to whether there is in fact an "established framework of a particular hierarchical denominational church." See discussion in Note, *Judicial Intervention in Disputes Over the Use of Church Property*, 75 HARV. L. REV. 1142, 1150-1160 (1964) and cases cited therein. Whether there is an established hierarchical framework to which St. Sava Serbian Eastern Orthodox Church is subject, is the very controversy which produced this litigation. To guarantee "denominational continuity" to the Petitioners when such a controversy continues would be to destroy the neutrality which the First Amendment demands and to which this Court is pledged.

> "Government in our democracy, state and national, must be neutral in matters of religious theory, doctrine and practice. It may not be hostile to any religion or to the advocacy of no religion; and it may not aid or foster or promote one religion or religious theory against another or even against the militant opposite. The First Amendment mandates governmental neutrality between religion and religion and between religion and non-religion."
>
> *Epperson v. Arkansas*, 393 U.S. 97, 103-104 (1969);
> *Everson v. Board of Education*, 330 U.S. 1, 18 (1947);
> *Zorach v. Clauson*, 343 U.S. 306, 313-314 (1952).

CONCLUSION.

For the foregoing reasons it is respectfully submitted that this petition for writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX.

DECISIONS OF COURT OF APPEALS OF CUYAHOGA COUNTY, OHIO, IN RELATED CASES.

Case No. 26957.

IN THE COURT OF APPEALS

EIGHTH JUDICIAL DISTRICT,
CUYAHOGA COUNTY.

SAVKO JOVANOVIC, *et al.*,

Plaintiffs-Appellees,

vs.

TOM SIMICH, *et al.*,

Defendants-Appellants.

OPINION OF THE COURT OF APPEALS.

(Rendered March 22, 1966.)

DUFFEY, *J.*

This very unfortunate litigation began with a petition for an injunction in the Common Pleas Court in Cuyahoga County. The lower court denied any relief and the case is now on appeal on questions of law only. A closely related case is also before the court. Some of the evidence in this case has been qualified, even contradicted, by evidence in the other pending case. However, the decision here must be based upon the *evidence of record in this action only.* A number of matters referred to in the briefs and arguments are not of record in this action and cannot be considered.

In reviewing the evidence, it is important to note that in an appeal on questions of law only the appellate court is required to respect the factual determinations of the

trial court. Accordingly, we have carefully selected that evidence which is most favorable to appellee Simich.

In December 1962, appellant Savko Jovanovic was a member in good standing of St. Sava Serbian Orthodox Church of Cleveland, Ohio. Tom Simich was the president of the church congregation and of its executive committee. The annual meeting of the church was called for December 2, 1962, and convened. A proposed resolution was reported out of the executive committee. This resolution recited the construction of a new church, school, and rectory, the incurring of a $400,000 debt, and that the regular income and contributions to the church building fund has not been adequate. Pertinent portions of the resolution provide:

"It is Resolved:

"That every member of the Serbian Orthodox General Assembly St. Sava in Cleveland, who has not contributed for the construction of the new church, school and rectory, $500.00 or more, from 1 January 1963, beside the regular monthly dues of $1.00 pays for the payment of the above-mentioned debt $10.00 per month, until the sum of $500.00 is attained.

"It is further resolved: that a member who pays no heed to this resolution, loses all membership rights prescribed in the Constitution and By-Laws of the General Assembly.

"This resolution does not encompass that member of the General Assembly who has attained 65 years of age or more, whose monthly income is not more than $125.00, nor that member who is an invalid and in impoverished condition.

"It is further resolved that a committee be chosen of three members who will investigate and establish the condition of those members who believe that this resolution does not apply to them and to report on these to the church board.

"This resolution does not relate to those members who have already paid their investment of $500.00.

"Members who have paid in less than 500 dollars, must besides the dues only continue to pay at the rate of 10 dollars per month until the sum of 500 dollars is paid.

"Members who until today have not paid anything are requested to pay within a period of five years at the rate of 10 dollars per month beside the regular dues which is in all 11 dollars per month. The opportunity and possibility is given that everyone participate and not feel it, so to speak. Who can give more and more quickly, the better it is for the church for less interest will have to be paid on the loan.

"Members who have invested their pledges of 500 dollars are requested to help further when and as much as they can."

The resolution was adopted by a vote of 48 for and 20 against. The petition alleges that this resolution will be enforced and be used to deny membership rights, in particular the right to vote at the annual meetings of the church. The resolution has been and is being enforced. Appellant and others in the same position have been and will be denied the right to vote solely because of failure to comply with the obligations of this resolution. The prayer and petition ask that the appellee be restrained from denying appellant and others of his class membership rights and from enforcing the resolution of December 2, 1962. The reply requests such other relief as may be appropriate.

Between the December 2, 1962, meeting of the church membership and the next annual meeting, a deep religious controversy arose. In May 1963, the then Serbian Orthodox Bishop was purportedly suspended by higher ecclesiastical authority. In addition, the previous diocese for United States and Canada, incorporated as an Illinois

corporation, was also purportedly split into three dioceses. St. Sava comes within the ecclesiastical jurisdiction of one of these new dioceses, and a new bishop was purportedly appointed with jurisdiction over that diocese. This tragic controversy is not apparent in the trial court record of this case, although it is the root and stem of the controversy in the companion case No. 27520.

It is important at the outset to strongly state to both factions that the ecclesiastical controversy cannot be resolved in a court of civil law. This court is not in any respect passing upon the religious, ecclesiastical authority of any patriarch, bishop or other clerical or nonclerical person.

On the other hand, St. Sava Serbian Orthodox Church of Cleveland, Ohio, is also a corporation organized under the laws of Ohio. The manner and procedure by which it carries on its corporate activities is controlled by the statutes of Ohio, the corporation's articles of incorporation and its regulations. St. Sava has adopted a set of bylaws. This court can and will apply the civil law pertaining to corporations as established in Chapter 1702, Revised Code, and the regulations adopted by the corporation in its bylaws. There is much evidence tending to show certain customs or practices in the conduct of the church's affairs. However, in reviewing action on corporate matters as opposed to ecclesiastical affairs, the methods and procedures are established by statute and by law. In the face of a challenge in court, no custom or practice which conflicts with the prescribed corporate procedure can be valid.

In our opinion, the resolution requiring the payment of funds in addition to regular dues as adopted at the December 2, 1962, annual meeting, was not validly adopted for at least three reasons, each of which by itself would invalidate it. There was no proper quorum to do

business. It was not passed by the vote required. It constitutes an attempt to amend the corporation's bylaws and as such was not validly adopted.

The bylaws require a quorum of one-fourth of the members in good standing. Part Three, Article I, Section 14 of the bylaws. The record here does not support a finding of a quorum at the December 2, 1962, meeting.

There are three methods by which membership in the church can be obtained:

(1) All persons who were members of the church in good standing as of the day the bylaws were adopted. Part Eight, Article I, Section 1.

(2) All persons who thereafter applied and were accepted in accordance with the provisions of the bylaws Part Two, Article 1.

(3) A wife of a member who herself is Eastern Orthodox, and who becomes a member of the "Circle of Serbian Sisters." Part Two, Article II, Section 2.

Membership eligibility extends to all adults over 18. Women are eligible for full membership, including voting rights. Part Two, Article I, Sections 1 and 2. A wife may be a member without the consent of her husband.

As of December 2, 1962, there were apparently about 777 members of the church. It is not clear whether this figure included all female members, especially those qualifying under the "Serbian Sisters" exception to application requirements. Further, there is no membership book kept in the manner required by Section 1702.13, Revised Code. On the other hand, not all of the members were members in good standing on December 2, 1962, and entitled to vote. A member who has not paid his dues for three months directly preceding an assembly meeting is denied the right to vote. Part Two, Article III, Section 4 of the bylaws. In our opinion, it necessarily follows that one

who, not being exempted from dues payment, has failed to pay his dues for three or more months before a meeting is not to be counted in determining either (a) the total membership for purposes of computing the one-fourth necessary for a quorum or (b) the number present to constitute a quorum.

There were 485 members who on November 30, 1962, had paid their dues. Another 15 paid dues prior to commencement of the meeting on December 2. Additional members paid their dues prior to the actual vote on the resolution. It would also appear that, in counting the number who had paid dues, the fact that ineligibility required nonpayment for at least three months was apparently ignored. Thus the figure of 500 members in good standing with paid-up dues is the minimum as of December 2, 1962.

To this minimum of 500 dollars dues-paid members must be added those who were exempt from paying dues. These are (1) members of the Circle of Serbian Sisters, (2) persons in the Armed Services, (3) students, (4) persons who requested and were granted release from dues by the assembly. See Part Two, Article II, Sections 2 and 3 of the bylaws. There is no evidence of the number of members who would fall into the last three categories. However, there is positive evidence that on December 2, 1962, there were 150 members of the Circle of Serbian Sisters (R. 284). An earlier witness, Mrs. Simich, had testified to a rough estimate of 120 members, but she admitted that she did not actually know. On the evidence, therefore, the smallest number of members in good standing on December 2, 1962, had to be something in excess of 650.

The evidence indicates that women were not usually considered in determining the total membership in connection with the computation of the quorum requirement,

i.e., one-fourth of the members. On the other hand, women were clearly counted in determining the number of members present at a meeting. The accuracy of the testimony as to the custom of not counting women in determining the one-fourth requirement is very dubious. The church has a number of dues-paying women members, and, clearly, the dues books were the reference point in testimony as to the total membership. However, accepting the testimony at its face value, such a custom cannot prevail over the clear provisions of the corporation's bylaws. Membership qualifications depend on the bylaws, and their provisions are positive and affirmative with respect to the status of women.

Turning now to the evidence of the number present at the December 2, 1962, meeting, it is agreed that the meeting commenced with at most 112 members. (Two of these had apparently not paid their dues—R. 119.) Thereafter, members came and went, and eventually a number of "Serbian Sisters" joined the meeting. There is evidence that a second count was taken. The most extreme figures given by any witness are those of Paul Cosic. He stated that he counted one side of the hall, that he stopped counting at 73, but he estimated there may have been 15 more on his side. Mr. Cosic's testimony as to the number on the other side of the hall is very vague. Mr. Zuber's testimony supports approximately 70. Assuming, although not necessarily finding, that 161 members were present, this is not one-fourth of 650. In our opinion, even pushing the total membership down to the lowest point on the evidence and stretching the membership present to the highest point, we cannot find that a quorum as required by the bylaws was present.

The actual vote cast was insufficient. Part Three, Article I, Section 30 of the bylaws provides:

"All decisions of the Assemblies shall be brought forth by a majority vote of the members *present*. In the event there is a tie, the vote of the presiding officer shall decide. This applies in all instances of decision among the committees." (Emphasis added.)

The evidence clearly established that the resolution received a vote of 48 for and 20 against. It is, therefore, apparent that the resolution was not adopted by a majority of the members present. Perhaps in past actions the church members have accepted decisions which were made on the basis of the majority of the members present and voting. However, the bylaws and statutes of Ohio are clear. See Section 1702.22 (B), Revised Code. In the face of a legal challenge, the requirement of the majority of those present must be met.

Regardless of the vote required and of the absence of a quorum, the resolution itself constituted an allegal attempt to amend the bylaws. Appellees concede that the steps necessary to accomplish a valid amendment were not followed. Accordingly, there is no need to discuss those steps. However, appellees contend that the bylaws authorize the setting of dues for the forthcoming year at the annual meeting and that the resolution was simply such a setting of dues. We cannot agree.

The only financial obligation authorized under the bylaws is the imposition of monthly dues for one year in advance. Part Two, Article II, Section 1. A member cannot be made liable for any debt of the corporation or obligated to pay any sum other than dues. A member can, of course, make voluntary contributions. The income from dues may be expended for any proper church purpose, including the payment of the debts of the corporation. In the present case, the dues had, for many years, been set at $13—$1 monthly and $1 additional at the annual meeting.

The church then incurred a mortgage debt of some $400,000 in connection with new construction. An effort was apparently made to obtain substantial contributions from the members. The dues, income and voluntary contributions were not large enough to meet the obligations of the church. The resolution in question is the result of efforts to raise additional funds. There was clearly a belief on the part of some members that the burden was not being fairly shared.

The resolution here attempts to require the payment of a fixed sum of $500, although permitting monthly installments of not less than $10. It might be noted that the funds so derived are "earmarked," i.e., stated to be for payment of the debt rather than simply added to the church treasury. We do not doubt that dues could be raised $10 per month for one year, that this could be collected from all members, and that the proceeds could be used to pay the church debt. The point is that the present resolution was an effort to impose a specific obligation.

In addition, and perhaps more importantly, the resolution is unequal, nonuniform and retrospective in its application. The additional burden is imposed only upon those members who have not previously made gifts amounting to $500 or more. This classification of members based upon their previous voluntary donations is, when tied to membership rights, unauthorized by the bylaws. Dues are required to be set prospectively and applied equally to all members. Even if this resolution were viewed as an attempted grant of exemption from prospective dues, the bylaws do not permit an exemption based upon previous gifts. See Part Two, Article II, Sections 1, 2 and 3.

The last question presented is whether there are any internal corporate remedies that appellants were required

to fulfill before invoking court action. The pertinent provisions of the bylaws are Part Five, Article I, Sections 2 and 10:

"2. Complaints against the decisions of the Regular Annual or Special Assembly Meetings shall be made to the higher Diocesan (sic) authorities.

"10. Complaints shall be filed within thirty days of the decision in question counting from the day that the plaintiff learned of the decision and not later than one year from the day the decision was brought forth."

Before the one-year period expired, it became impossible to know who or what was the "higher Diocean (sic) authorities." In May 1963, the then diocese was purportedly split into three parts, and the then bishop purportedly suspended by ecclesiastical authority in Belgrade, Yugoslavia. Whether this would affect the *corporate* position of the Illinois corporation is an issue of law not yet resolved.

Secondly, any complaint to either of the "higher Diocean (sic) authorities" became moot. Within the one-year period, both the previous and the newly appointed bishops stated their positions on the validity of the resolution—one considering it valid, one considering it invalid. Appellees did not accept the latter ruling, and the appellants challenge the former.

Finally, the resolution in question cannot be considered a "decision" of the annual assembly. It was not adopted by the required vote, there was no quorum, and the steps necessary for an amendment to the bylaws were not followed.

Under these circumstances, we believe that the internal corporate remedy did not constitute a bar to relief in the Common Pleas Court.

Since the filing of the suit, an election of officers was held. The right to vote was based upon the resolution of December 2, 1962. It is apparent that in providing appellants with relief against the resolution, the election is also affected. While the present acting officers should continue to conduct the ordinary affairs of the corporation, a new election must be held. Rather than issue an injunction in this court, the case will be remanded to the Common Pleas Court for the granting of appropriate relief. The order of remand will include instructions to grant a permanent injunction against the enforcement of the resolution, and to oversee, by a master commissioner or otherwise, (1) the preparation of a membership book as provided by Section 1702.13, Revised Code, (2) the opportunity for all members to pay all past and current dues, based upon the previous rate of $1 per month, and (3) the call of a membership meeting and the conduct of an election.

The judgment of the Common Pleas Court will be reversed and vacated, and the case remanded with instructions.

BRYANT, P.J., and DUFFEY, J., concur.

Case No. 26957.

IN THE COURT OF APPEALS

EIGHTH JUDICIAL DISTRICT,
CUYAHOGA COUNTY.

SAVKO JOVANOVIC, *et al.*,

Plaintiffs-Appellees,

v.

TOM SIMICH, *et al.*,

Defendants-Appellants

JOURNAL ENTRY OF THE COURT OF APPEALS.

(Filed May 26, 1966.)

This cause came on to be heard as an appeal on questions of law upon the record, briefs and argument of counsel.

Upon consideration thereof, the Court finds error to the prejudice of appellants. The resolution adopted at the December 2, 1962, annual membership meeting of St. Sava Serbian Orthodox Church of Cleveland, Ohio, requiring the payment of funds in addition to regular dues, is invalid; appellants' rights to vote at the election of officers were legally denied; and appellants' right to appropriate equitable relief was improperly refused, all for the reasons stated in the decision of this Court dated March 22, 1966. In particular, appellants have been illegally denied the right to vote as members of the Church Corporation solely because of failure to comply with the provisions of the invalid resolution. The Court further finds that appellants have been deprived of substantial rights by the election of officers of the corporation on the basis of invalid voting restrictions. A permanent injunc-

tion should issue restraining appellees from enforcing or attempting to enforce that resolution and from using or attempting to use it as a basis for determining rights and membership in the Church Corporation. To fully effectuate appellants' rights, further equitable relief should be granted requiring that a new election of officers be held.

It is therefore ordered, adjudged and decreed that the judgment of the Court of Common Pleas of Cuyahoga County be and hereby is reversed and vacated and the cause be and hereby is remanded to that Court with instructions to:

(1) Grant a permanent injunction prohibiting the enforcement of the resolution of December 2, 1962, relating to the payment of funds in addition to regular dues, and the denial to appellants and others similarly situated of their right to vote because of their failure to comply with that resolution.

(2) Require the holding of an election of officers in accordance with the bylaws of the Church Corporation and the law of Ohio, such election to be held at such time as the Court of Common Pleas may determine to be appropriate.

(3) Oversee, by a Master Commissioner or otherwise, (a) the preparation of a membership book as provided by Section 1702.13 Revised Code, (b) the determination of individual claims to be a member or for reinstatement as a member of the Church Corporation, and (c) the call of a membership meeting and the conduct of the election.

(4) Hold such further proceedings as may be in accordance with law.

Exceptions to all parties.

Case No. 27520.

IN THE COURT OF APPEALS

EIGHTH JUDICIAL DISTRICT,
CUYAHOGA COUNTY.

ST. SAVA SERBIAN ORTHODOX CHURCH OF CLEVELAND, OHIO,

Plaintiff-Appellant,

v.

MILAN NAPERTA, *et al.*,

Defendants-Appellees.

DECISION OF THE COURT OF APPEALS.

(Rendered on April 7, 1966.)

DUFFEY, *J.*

This is an appeal on questions of law and fact from a judgment of the Common Pleas Court of Cuyahoga County. That court granted a permanent injunction against defendants-appellants, restraining them from claiming office in St. Sava Serbian Orthodox Church, interfering with the conduct of church officers, requiring an accounting and certain other relief.

St. Sava Serbian Orthodox Church is an Ohio corporation not for profit. The petition is in the name of the church. It alleges, in essence, that defendants-appellants illegally claim to hold corporate offices and are illegally acting in various ways to interfere with the conduct of church affairs. A general denial and so-called "cross-petition" were filed. The cross-petition names as defendants certain individuals, alleges that defendants-appellants are the true, lawful officers of St. Sava Church, and that the new defendants are the ones who illegally

claim and are attempting to exercise corporate authority in the church.

At the outset, we again remind all parties that a man's beliefs, and his acceptance or rejection of ecclesiastical authority, cannot be decided for him. By coming into a civil court, only the control of buildings and material things can be effected. Such control can be used as a weapon to deepen the wounds of controversy, but of itself cannot help solve religious differences. Everyone should clearly understand that no court of civil law can restore unity to the congregation of St. Sava Church.

In our opinion, the petition is well taken and the church is entitled to injunctive relief against the defendants-appellants. The cross-petition is not well taken and must be dismissed.

An election of officers was held at the regular annual meeting on December 2, 1962. That election was apparently proper and has never been challenged. Accordingly, it is the beginning point in the statement of the present status of the church.

The executive committee members are "trustees" of the corporation within the meaning of Section 1702.01, Revised Code. There is no provision in the corporate articles or regulations (bylaws) as to the effect of an invalid election or failure to hold an election of officers as that would relate to the term of previously elected officers. Therefore, under Section 1702.28, Revised Code, a trustee (executive committee member) holds office "until his successor is elected."

At the 1962 meeting, a resolution was purportedly adopted imposing an obligation upon some members to pay up to $500. That resolution was the subject of litigation in case No. 26957. In that case this court held the resolution invalid. The entire record of that case was

added to the evidence in this case by stipulation and grant of leave, pursuant to Section 2505.21, Revised Code. Upon review of all the evidence before us in the present case, we again determine that the resolution is invalid.

The 1962 resolution was used as the basis for determining voting rights at the next meeting held January 26, 1964. The election held at that meeting was therefore invalid. Special meetings were purportedly held on February 23, 1964, and March 8, 1964. Under Part Three, Article I of the bylaws, a special meeting must be called in the same manner as a regular meeting. The requirements include a written notice or invitation, and the notice must be at least thirty days before the date of the meeting. See Part Three, Article I, Section 3, and Section 2E) and F). A shorter notice period may be set by the executive committee. Part Three, Article I, Section 3B).

The February 23, 1964, meeting was improperly called for a variety of reasons, including lack of written notice. The March 8, 1964, meeting was invalid for a variety of reasons, including the lack of a 30-day notice or permission for a shorter notice.

Accordingly, it follows that the persons elected at the meeting of December 2, 1962, continue to hold office, and were authorized to act upon behalf of the corporation, including the filing of this suit. The evidence supports the Common Pleas Court findings that defendants-appellants have illegally and improperly interfered with the conduct of the affairs of the church. An injunction, essentially in the form of the *operative* provisions of the entry below, will be granted. The entry should exclude references to the January 26, 1964, election, and the references in part (b) and (c) on page eight of the Common Pleas entry.

For the reasons already stated, defendants-appellants do not hold office in the corporation. The underlying basis of the entire "cross-petition" against the new defendants is therefore unsupported on its merits.

The propriety of the "cross-petition" rests upon Section 2309.16, Revised Code. That section provides in part:

> "A counterclaim is a cause of action existing in favor of one or more defendants against one or more plaintiffs or one or more defendants, or both, between whom a several judgment might be had in the action, and arising out of the contract or transaction set forth in the petition as the foundation of the plaintiff's claim, or connected with the subject of the action or arising out of contract or ascertained by the decision of a court."

Since a counterclaim presupposes a pending action, it is apparent that the references to plaintiffs and defendants refer to the parties to the *original proceeding*. A counterclaim must, therefore, be a cause of action in one of the parties to the original proceeding against one of the parties to the original proceeding. Of course, if such a cause of action is asserted by way of counterclaim, and that cause of action requires the addition of a new party, the new party may be added. Sections 2309.17 and 2309.18, Revised Code. However those statutes permit the addition of a new party to a "counterclaim" and are, therefore, controlled by the basic counterclaim statute, Section 2309.16, Revised Code. On the other hand, our use of the word "original" is not intended to limit the operation of the statute to claims against parties originally *named*. There may be a person not named originally who must or may be joined as a party plaintiff or defendant to the original proceeding. If properly made a party, such

a person falls within the counterclaim statute, and a claim may be asserted against him by any other party—subject to the other limitations relating to the same transaction, subject of action, etc., found in the statute.

In the present case, the counterclaim does not involve a claim against the corporation or against any of the original parties defendants to the corporation's action. It constitutes an attempt at third-party practice. While such joinder of causes and parties would frequently facilitate litigation and avoid unnecessary duplication, it has not yet been adopted in Ohio.

An entry granting an injunction in accordance with the petition and this decision, and ordering the dismissal of the counterclaim, may be submitted.

BRYANT, *P.J.*, and DUFFEY, *J.*, concur.

Case No. 27520.

IN THE COURT OF APPEALS

EIGHTH JUDICIAL DISTRICT,

CUYAHOGA COUNTY.

ST. SAVA SERBIAN ORTHODOX CHURCH OF CLEVELAND, OHIO,

Plaintiff-Appellant,

v.

MILAN NAPERTA, *et al.*,

Defendants-Appellees.

JOURNAL ENTRY OF THE COURT OF APPEALS.

(Entered October 10, 1966.)

This cause came on to be heard upon an appeal on questions of law and fact, the original papers, transcript, transcript of the docket and journal entries in the Court of Common Pleas of Cuyahoga County, Ohio, and briefs, and was argued by counsel for both Appellant and Appellee and the same was submitted to this Court.

UPON CONSIDERATION WHEREOF this Court finds:

1. That St. Sava Serbian Orthodox Church of Cleveland, Ohio, is an Ohio non-profit corporation.

2. That an election of officers was held at the regular annual meeting on December 2, 1962, and that election was proper and has never been challenged.

3. That since the resolution passed at the December 2, 1962 meeting has been held invalid by this Court in Case No. 26957, and we again determine it to be invalid here, and since that resolution was made the basis of voting rights at the January 26, 1964 meeting, it follows

that the election held at the January 26, 1964 meeting was invalid.

4. That the special meetings of February 23, 1964 and March 8, 1964, are invalid because of lack of notice required under the church corporation code of regulations (by-laws) and for other reasons.

5. That the officers of the church, elected at the December 2, 1962 meeting are the only presently valid officers of the church and shall so remain until their successors are elected, pursuant to Section 1701.28 Revised Code and the by-laws of the St. Sava Serbian Orthodox Church of Cleveland, Ohio; and until that time those officers shall be authorized to continue acting on behalf of the corporation as they have been in the past.

6. That Defendants-Appellants have illegally and improperly interfered with the conduct of the affairs of the church; that Defendants-Appellants do not hold office in the church corporation; that the Petition of Plaintiff is well taken and the church is therefore entitled to injunctive relief against Defendants-Appellants; and that the Cross-Petition of Defendants-Appellants is not a claim against the corporation nor against any of the original parties defendants, pursuant to Section 2309.16, Revised Code, and as such is not well taken and must be dismissed.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the Petition of Plaintiff is well taken and Plaintiff is entitled to relief; that Defendants are not entitled to the relief prayed for in their Cross-Petition and it is accordingly dismissed.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that defendants, Milan Naperta, Dobrosav Milisavljevic, Zivorad Bogojevic, Alex Matic, Boris Colich, Paul Yovanovic, Arsa Mandic, Savko Jovanovic, John Milovano-

vich, Gligorije Djuric, Vojislav Blagojevic, Stojan Stojanovic, Vladimir Lazukic, Vlastimir Vulich, Vladimir Mitic, Risto Janjic, Rajko Stijovic, Milenko Markovic, Vlajko Pukic and Radoslav Nedeljkovic, the several members of their families and all other members of St. Sava Serbian Orthodox Church who subscribe to their past actions and conduct be, and each of them hereby is, perpetually enjoined (a) from interfering in any manner whatsoever with the lawful conduct of the administration of such church by the present officers and committeemen or their successors, (b) from any interference with the services of worship in said church, (c) from inciting, encouraging or participating in any disorder or riotous conduct in or around or in the immediate vicinity of said church and its appurtenances, (d) from causing or encouraging any damage to any of the property of said church, and (e) from threatening or doing bodily harm to any of the new defendants in their capacities as members of the Executive Committee, the Auditing Committee during their incumbency or otherwise; provided, however, that defendants, individually are not hereby restrained from worshipping in said church or from exercising the rights of membership therein in accordance with the by-laws thereof.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the defendants and each of them, the several members of their families and all other members of St. Sava Serbian Orthodox Church who subscribe to their past actions and conduct be, and they hereby are, perpetually enjoined from in any manner representing or holding themselves out to be and acting as the duly elected and acting officers and committeemen of said church until and unless they or any of them shall accede to such place by an election lawfully held and conducted.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the defendants and each of them render an accounting within thirty (30) days from the filing hereof of any and all moneys or other property, if any, received by them from any source for and on behalf of plaintiff church during the period from February 23 to and including March 8, 1964; and that the defendants within five (5) days take such steps and actions as may be necessary to relieve and release the frozen condition of the bank account or accounts of St. Sava Serbian Orthodox Church with the Cleveland Trust Company in favor of the plaintiff and the new parties defendants.

To all of which Defendants-Appellants, by counsel, except.

Case No. 27520.

IN THE COURT OF APPEALS

EIGHTH JUDICIAL DISTRICT.
CUYAHOGA COUNTY.

ST. SAVA SERBIAN ORTHODOX CHURCH OF CLEVELAND, OHIO,

Plaintiff-Appellant,

v.

MILAN NAPERTA, *et al.*,

Defendants-Appellees.

JOURNAL ENTRY NUNC PRO TUNC OF THE COURT OF APPEALS.

This cause came on to be heard and the court being duly advised finds that the entry of October 10, 1966, does not clearly reflect the intention of the court as shown by its opinion, with reference to the persons presently authorized to hold office in, and exercise the powers of the church corporation.

The court finds, and the parties agree, that the following persons were elected at or appointed as a result of the church meeting of December 2, 1962, to the following designated offices:

Executive Committee

Tom Sifnich	President
George Borato	Vice President
Branko Uzelac	Vice President
Djuro Majstorovic	Secretary
Michael Zubel	Treasurer
Alexander Zugich	Fin. Secretary
Stojan Stojanovic	Vestryman
Vlada Lazukic	Vestryman

Ranko Majstorovic	Vestryman
Vlada Alexsandrovic	Vestryman
Tode Cosic	Vestryman
Gligorije Djuric	Vestryman
Pavle Cosic	Committeeman
Alexander Matic	Committeeman
Pavle Jovanovic	Committeeman

Audit Committee

Mile Djakovich	
Nikola Vurdelja,	deceased, Risto Janic appointed to fill vacancy
Dragan Cupkovich	
Branko Uscumljic	
Dusan Yovich	

The court further finds that except as stated in this entry, the defendants-appellants do not now hold office in the church corporation, and are not now entitled to exercise the powers of the various offices, and should be enjoined from any illegal interference with the conduct of the affairs of the church.

Wherefore, it is ordered that the persons stated be and are hereby, authorized to exercise the powers granted to the designated offices by the statutes of Ohio and the bylaws of the corporation until such time as their successors are duly elected, but subject to the order of any court having jurisdiction of the parties or the corporation.

It is further ordered that except as the persons named herein are in the exercise of the authority granted by this entry, the defendants-appellants shall continue to be subject to the terms of the injunction provided by the entry of October 10, 1966.

This entry is made nunc pro tunc, modifying and correcting the entry of October 10, 1966.

PERTINENT PORTIONS OF CHURCH BY-LAWS.

By Laws
of the
St. Sava Serbian Eastern Orthodox Church
of Cleveland, Ohio

* * * * *

ARTICLE II

Objectives and Purposes

1. The objectives and purposes of the Church Congregation shall be:

(B) To spread and foster love and respect; for the Serbian Orthodox people, the people of the United States of America, the Constitution of the United States and the Democratic-American way of life.

* * * * *